OCBC Bank (M) Bhd v Au Kee Sian & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–04–770 OF 2002
ABDUL AZIZ MOHAMED FCJ, MOHD NOOR ABDULLAH AND TENGKU BAHARUDIN SHAH JJCA
11 SEPTEMBER 2006

Land Law — Sale of land — Order for — Appeal against dismissal of application for order for sale — Whether grant an order for sale would be contrary to some rule of law or equity

The appellant bank appealed against the dismissal by the High Court of their application for an order for sale under s 256(3) of the National Land Code 1965 of the respondents' land, which had been charged to the appellants as one of the securities for loan facilities granted by the appellants to a company by the name of Meko Offset Printing Sdn Bhd ('the borrower'). The loan facilities that were granted to the borrower comprised of an overdraft. It was contended by the respondent that there was a reduction of the limit of the overdraft facilities from RM380,000 to RM280,000 via two payments each of RM50,000 and that there was a further reduction of the limit due to various other payments. It was further added that the various other payments besides the two specific RM50,000 payments should have reduced the limit of the overdraft further but that did not happen and the appellants continued to allow the borrower to operate the account in excess of what to the respondents should have been the further reduced limits.

Held, allowing the appeal:

(1) The learned judge was in error because he failed to appreciate that the appellants could not use a payment to reduce the overdraft limit unless it was made specifically for that purpose, and that the two payments of RM50,000 each had been made for the purpose. If the overdraft limit was reduced further by a payment not made for the purpose, and consequently the borrower could not draw beyond the further reduced limit, the borrower, who needed to use the overdraft as working capital for their business, would have cause to go for the appellants. The various payments into the overdraft account that the first respondent mentioned were day-to-day transactions in the ordinary course of the borrower's business and were not made specifically for reducing the overdraft limit (see para 9).

(2) Had the appellants actually allowed the borrower to draw on the account in excess of the overdraft limit, a question would arise whether it can be said that, for that reason, to grant an order for sale would be contrary to some rule of law or equity. But the question did not arise in this case as there was no factual basis for the decision that to grant the order for sale would, as the learned judge

thought, be contrary to equity and good conscience. The appellants rightly did not reduce the overdraft limit further than RM280,000, which limit the borrower was not allowed to exceed and did not exceed (see para 10).

[Bahasa Malaysia summary

Perayu bank telah merayu terhadap penolakan Mahkamah Tinggi tentang permohonan untuk perintah jualan mereka di bawah s 256(3) Kanun Tanah Negara 1965 ke atas tanah responden-responden, yang telah dicagarkan kepada perayu sebagai salah satu daripada cagaran untuk kemudahan kewangan yang telah diberikan oleh perayu kepada sebuah syarikat yang dikenali sebagai Meko Offset Printing Sdn Bhd ('peminjam'). Kemudahan kewangan yang diberikan kepada peminjam terdiri daripada satu overdraf. Adalah ditegaskan oleh responden bahawa terdapat pengurangan dalam had kemudahan kewangan daripada RM380,000 kepada RM280,000 melalui dua bayaran berjumlah RM50,000 setiap satu bayaran dan bahawa terdapt pengurangan lagi kepada had itu disebabkan oleh pelbagai bayaran lain. Ditambah lagi bahawa pelbagai bayaran lain itu selain daripada dua bayaran RM50,000 yang khusus itu sepatutnya telah mengurangkan had overdraf itu selanjutnya tetapi itu tidak berlaku dan perayu terus membenarkan peminjam mengendalikan akaun itu melebihi apa yang responden sepatutnya mengurangkan selanjutnya had itu.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim yang bijaksana terkhilaf kerana beliau gagal untuk menyedari bahawa perayu tidak boleh menggunakan suatu bayaran untuk mengurangkan had overdraf kecuali ia dibuat khususnya untuk tujuan tersebut, dan bahawa dua bayaran RM50,000 setiap satunya telahpun dibuat untuk tujuan tersebut. Jika had overdraf dikurangkan lagi dengan satu bayaran yang tidak dibuat bagi tujuan tersebut, dan akhirnya peminjam tidak dapat mengeluarkan melebihi had seterusnya yang dikurangkan, peminjam itu, yang perlu menggunakan overdraf itu untuk modal pekerjaan perniagaannya, terpaksa bersemuka dengan perayu. Pelbagai bayaran ke dalam akaun overdraf yang dinyatakan oleh responden pertama merupakan transaksi harian dalam urusan biasa perniagaan peminjam dan tidak dibuat khususnya untuk mengurangkan had overdraf (lihat perenggan 9).

(2) Sekiranya perayu sememangnya membenarkan peminjam untuk mengeluarkan daripada akaun melebihi had overdraf itu, satu persoalan yang akan timbul adalah sama ada ia boleh dikatakan, untuk alasan, itu, untuk membenarkan perintah jualan akan, sepertimana yang hakim bijaksana fikirkan, bertentangan dengan ekuiti dan sikap jujur. Perayu dengan betul tidak mengurangkan had overdraf itu lagi daripada RM280,000, yang mana had itu peminjam tidak dibenarkan melebihinya atau melebihinya (lihat perenggan 10).]

Notes

For cases on orfer for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50
National Land Code 1965 s 256(3)

Appeal from: Originating Summons No 24–1488 of 2000(MT4) (High Court, Pulau Pinang)

Christina Siew (Lim Kean Siew & Co) for the appellants.
Jacy Rani Paloosamy (Ong & Manecksha) for the respondents.

Abdul Aziz Mohamad FCJ (delivering judgment of the court):

[1] The appellant bank appealed against the dismissal by the High Court of their application for an order for sale under s 256(3) of the National Land Code 1965 ('NLC') of the respondents' land, which had been charged to the appellants as one of the securities for loan facilities granted by the appellants to a company by the name of Meko Offset Printing Sdn Bhd ('the borrower'). By a unanimous decision, we allowed the appeal and remitted the case to the High Court to make the order for sale and ancillary orders.

[2] The loan facilities that were granted to the borrower comprised an overdraft to a limit of RM380,000 and various other facilities, also to a limit of RM380,000. They were granted on 30 November 1990, but those limits were increased limits approved on 11 April 1991. The lending bank was Oversea-Chinese Banking Corporation Limited, which on 1 July 1994 transferred its business to the appellant bank by a transfer that was given effect to by an order pursuant to s 50 of the Banking and Financial Institutions Act 1989.

[3] The charge of the land was registered on 22 July 1991, having been executed by the first respondent and the then other owner, Ngiam Seng Lian, who, on 8 May 1995, transferred her undivided half share to the second respondent, who then, by virtue of cl 37 of the charge annexure, became bound by the charge.

[4] The borrower defaulting in respect of the various facilities, on 27 June 2000 the appellants served on the respondents a notice of default in Form 16D of the NLC. As regards the overdraft facility, the notice stated that as at 31 May 2000 the amount outstanding was RM235,094.64. I mention the overdraft facility only because the

cause that the learned judge in the High Court found to exist for refusing an order for sale related to the overdraft facility. The question of the cause came about as follows.

[5] On 18 April 1995, the borrower wrote to the appellants as follows:

> We have the pleasure to inform you that during our EGM held on 6 April 1995, we have come to resolve the followings:
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> That the Company's bank borrowing with you, pledged under Third Party Charge on property at No 34, Jalan Azyze, Tanjung Bungah, Hillside, Penang, to be reduced as follows:
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> 1.
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> a) by 31 December 1995 borrowing to be reduced by RM50,000;
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> a) by 31 December 1996 borrowing to be reduced by another RM100,000;
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> a) by 31 December 1997 borrowing to be reduced by another RM100,000;
>
> a) by 31 January 1998 the property to be fully redeemed and discharged;
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> 2. the company shall limit from issuing cheques exceeding the RM380,000 limit granted by your bank.
>
> Kindly abide to our above requests which shall take immediate effect from the date hereof and keep us inform [sic] from time to time on our credit limit. And also, we request you to inform the owners of the property from time to time, as and when, the limit is scaled down.

[6] It was not in dispute that that was a request to reduce the limit of the overdraft facility. In fact, such may be inferred from paragraph 6 of the first respondent's affidavit dated 30 April 2002, wherein he referred to three letters, which were exhibited, to show that the appellants started to reduce the limit of the overdraft. The first was a letter dated 18 January 1996, whereby the appellants informed the borrower that they had that day reduced the overdraft limit from RM380,000 to RM330,000. Another was a letter dated 6 January 1997, whereby the appellants referred to the borrower's said letter of 18 April 1995 and requested the borrower to make payment into their account to enable the appellants to further reduce the overdraft limit as requested. The last was a letter dated 13 January 1997, whereby the appellants informed the borrower that they had that day reduced the overdraft limit from RM330,000 to RM280,000. It was not in dispute, although it was not specifically stated in the affidavits, that those two reductions of the overdraft limit by RM50,000 each time was made because the borrower made two payments each of RM50,000 in order to reduce the overdraft limit. But the first respondent, in paragraph 3 of his affidavit dated 11 July 2002, made an equivocal averment that sufficient moneys had been paid into the loan account to settle the debt but the appellants had continued to extend the overdraft to the borrower in excess of the agreed limits. I say 'equivocal averment' because the first respondent did not say that the payments were to reduce the limit of the overdraft further, but said that they should have settled the debt. As if to illustrate what he meant, the first respondent, by paragraph 5 of that affidavit, exhibited statements of account for the period 31 December 1997 to 30 September 1998 (exh AKS 9), but without spelling out the

point that he sought to make. Such being the quality of the first respondent's averments, the appellants, in paragraph 4 of their affidavit dated 15 July 2002, merely denied that the payments had fully settled the overdraft and maintained that they had been extending the overdraft facility to the borrower within the agreed limits.

[7] It was only in the submission of the respondents' counsel in the appeal — and a submission on similar lines would have been made in the High Court too — that it became clear that the respondents' point was that every other payment besides the two specific RM50,000 payments should have reduced the limit of the overdraft further but that did not happen and the appellants continued to allow the borrower to operate the account in excess of what to the respondents should have been the further reduced limits. The respondents' counsel pointed to a specific example from the aforementioned statements of account (exh AKS 9). On 18 August 1998, the account was overdrawn, or in debit, by RM279,199.26. On 28 August 1998, there was a payment of RM205,000 which reduced the debt to RM74,199.26. My understanding of the respondents' point was that the amount of the reduced debt should also have been treated by the appellants as the new overdraft limit, so that henceforth they should not have allowed the borrower to operate the account beyond the limit of RM74,199.26, but they nevertheless continued to allow the borrower to draw on the account beyond that limit, so that on 30 September 1998 the account stood overdrawn at RM198,629.96.

[8] The learned judge, who was also shown the payment of RM205,000, agreed with the respondents. He said:

> It is the defendants' contention that since this is a Third Party Charge and since the Borrower had indicated that by 31 January 1998 the borrowing would have been gradually reduced so much so that by that date the said property would be fully redeemed and discharged, the plaintiff had no right to grant any further extension of the facilities on the defendants' charge. In my view the conduct of the plaintiff in giving further credit after agreeing with the Borrower's proposal as contained in the Borrower's letter dated 18 April 1995, clearly has satisfied this Court that the grant of an order for sale would be contrary to equity and good conscience as envisaged under category (iii) by the Federal Court in *Low Lee Lian*.

That was the only reason for not granting the order for sale. The mention of 'category (iii)' was a reference to the judgment of the Supreme Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 that cause to the contrary within s 256(3) of the NLC may be established only in three categories of cases. As regards the third category, the Supreme Court said at p 46b–c: 'Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity'.

[9] The appellants' counsel submitted that the learned judge was in error because he failed to appreciate that the appellants could not use a payment to reduce the overdraft limit unless it was made specifically for that purpose, and that only the two payments of RM50,000 each had been made for the purpose. If the overdraft limit was reduced further by a payment not made for the purpose, and consequently the borrower could not draw beyond the further reduced limit, the borrower, who needed to use the overdraft as working capital for their business, would have cause

to go for the appellants. The appellants' counsel emphasized that the various payments into the overdraft account that the first respondent mentioned in his affidavit were day-to-day transactions in the ordinary course of the borrower's business and were not made specifically for reducing the overdraft limit.

[10] I agreed entirely with that submission, which was perfectly sound and to which there was no answer. Had the appellants actually allowed the borrower to draw on the account in excess of the overdraft limit, a question would arise whether it can be said that, for that reason, to grant an order for sale would, in the words in *Low Lee Lian*, 'be contrary to some rule of law or equity'. But the question did not arise in this case as there was no factual basis for the decision that to grant the order for sale would, as the learned judge thought, 'be contrary to equity and good conscience'. The appellants rightly did not reduce the overdraft limit further than RM280,000, which limit the borrower was not allowed to exceed and did not exceed.

[11] That was the only point in the appeal, and as the appellants succeeded on that point the appeal was allowed and the case was remitted to the High Court to make the necessary orders.

[12] These grounds of judgment have the concurrence of my learned brother Tengku Baharudin Shah JCA. The views of Mohd Noor Abdullah JCA have not been obtained because the draft grounds were only prepared after he had gone on retirement.

Appeal allowed.

Reported by Peter Ling